A **YT MARKETING SDN BHD**

v.

TAN WHYE KION & ANOR

B COURT OF APPEAL, PUTRAJAYA
CLEMENT SKINNER JCA
LIM YEE LAN JCA
ROHANA YUSUF JCA
[CIVIL APPEAL NO: B-02-1707-2011]
C 12 DECEMBER 2013

LANDLORD AND TENANT: *Determination - Double rent - Claim for - Holding over after determination of tenancy - Interim orders - Application for vacant possession and interim payment of monthly rental*
D *pending disposal of action - Whether doctrine of res judicata applied during trial for claim of double rental - Whether order for possession a final judgment - Whether appellant prevented from re-litigating matter - Whether appellant waived its rights to claim for double rental - Whether interim orders granted had anything to do with claim for double rental -*
E *Whether claim for double rental allowed - Civil Law Act 1956, s. 28(4)(a)*

CIVIL PROCEDURE: *Res judicata - Matters which could reasonably have been raised in earlier proceedings - Claim for double rental -*
F *Interlocutory applications - Orders granted for vacant possession and interim payment of monthly rental pending disposal of action - Whether application for double rental should have been made during application for vacant possession - Whether appellant waived its rights to claim for double rental by accepting sums payable under interim orders - Whether*
G *order for possession a final judgment - Whether appellant prevented from re-litigating matter - Whether interim orders granted had anything to do with claim for double rental - Whether claim for double rental allowed*

The appellant, the registered owner of a four storey building, had let the ground floor of the building to the respondents under a
H tenancy agreement dated 11 May 1992. The term of the tenancy was for three years which commenced on 1 June 1992 and the agreement contained an option clause to renew the tenancy for a further two years from 1 April 1995 to 31 March 1997. The option to renew was exercised by the respondents and thus, the
I tenancy would expire on 31 March 1997. Some months before the said expiry, the appellant indicated to the respondents that it was prepared to grant a new tenancy to the respondents for three years at RM4,500 per month. A dispute arose when there was no

agreement to this new rental between the parties and as a result, no new tenancy agreement was entered into between the parties after 31 March 1997. However, the respondents continued to remain in occupation of the premises. The appellant then filed a claim for payment of double rental. In the meantime, certain applications were made by the appellant and the following orders were granted, *ie*,: (i) *interim* payments of RM2,250 per month from April 1997 pending the final disposal of the action (*vide* order dated 1 December 1998); (ii) the respondents to quit and deliver vacant possession of the premises to the appellant (*vide* order dated 1 March 2004); and (iii) payment out to the appellant for the sum of RM193,500 representing the agreed rentals from April 1997 to June 2004 being the time when vacant possession was handed over (*vide* order dated 12 July 2006). In respect of the appellant's claim for double rental, the judge decided the issue based on the doctrine of *res judicata* and held that the issues raised had been previously litigated and determined. Reference was made to the orders dated 1 December 1998 and 12 July 2006. It was further held that since the appellant had accepted the amount stated in the orders, it must be deemed to have waived any sums for double rental. Hence, this appeal. It was argued; *inter alia*, that (i) the doctrine of *res judicata* had no application herein; (ii) the issue of whether the appellant was entitled to be paid double rental was never considered by the court; and (iii) the claim for double rental was very much a 'live' issue. On the other hand, the respondents argued that (i) the order for possession made on 1 March 2004 was a 'judgment' and therefore, was not interim in nature since it gave possession of the premises to the appellant; (ii) the order for possession was a final judgment; and (iii) during the application for vacant possession, the appellant could have included a prayer for double rental from 1 April 1997 until possession was delivered. By not doing so, the respondent alleged that the appellant was prevented from re-litigating a matter which could have been raised earlier on.

Held (allowing appeal; setting aside decision of the High Court)

Per Clement Skinner JCA delivering the judgment of the court:

(1) The order made on 1 December 1998 relates to the interim payment of monthly rentals pending the final disposal of the action. It did not concern the issue of whether the appellant was entitled to be paid double rental. Clearly, the order was

neither final nor had been made on the merits regarding the payment of double rentals. The subsequent order dated 12 July 2006 relates directly to the payment out of interim rentals of RM2,250 which had nothing to with the issue of whether the appellant was entitled to be paid double rental. (paras 26 & 27)

(2) When the appellant filed this suit, one of the reliefs sought was for payment of double rental. Therefore, the appellant had already complied with the rule in *Henderson v. Henderson* that a litigant should put forward his whole case. Having done so, there was nothing wrong when the appellant made an interlocutory application for vacant possession while leaving the issue of double rental to go to trial. (para 28)

(3) The claim for double rental is a claim recognised under s. 28(4)(a) of the Civil Law Act 1956 ('the Act'). The appellant's claim for double rental was based on the issue of whether the respondents were holding over after the determination of their tenancy, which was completely different from whether the appellant was entitled to obtain an interim payment of rental while awaiting the outcome of the case. Hence, it could not be said that the appellant had waived such a claim when it obtained an order for payment out of the interim rentals. Further, the order for vacant possession did not address or decide on the question of whether the appellant was entitled to be paid double rental. (paras 29 & 30)

(4) The appellant's claim for double rental and the application for interim payment of monthly rentals were not claims which were alternative and mutually exclusive to the other. They were completely different claims where one was payment for holding over whereas the other was a payment of rental, both of which a landlord would be entitled to claim if he is able to prove the factual circumstances permitting him to do so. (para 31)

(5) By 31 March 1997, the tenancy of the respondents had been determined by effluxion of time where no new tenancy agreement was entered into between the parties. Instead of delivering vacant possession of the premises, the respondents continued to hold over even after the determination of their tenancy. Hence, s. 28(4)(a) of the Act came into play and the appellants were entitled to charge the respondents double the

amount of their rental or with double the value of the demised premises. In this case, the appellant chose to claim double the amount of the rental. When the tenancy expired, the respondents were paying rental for RM2,250 per month and double of that would amount to RM4,500. (paras 37 & 38)

[The respondents were ordered to pay double rental at RM4,500 per month from 1 April 1997 until 30 June 2004 thereby making the sum payable of RM391,500. From that amount, a sum of RM195,750 would be deducted representing the amount already paid to the appellant].

Bahasa Malaysia *Translation Of Headnotes*

Perayu, pemilik berdaftar sebuah bangunan empat tingkat, telah menyewakan tingkat bawah bangunan itu kepada responden-responden di bawah satu perjanjian sewa bertarikh 11 Mei 1992. Tempoh penyewaan adalah untuk tiga tahun bermula dari 1 Jun 1992 dan perjanjian tersebut mengandungi klausa pilihan untuk membaharui penyewaan tersebut bagi tempoh dua tahun bermula dari 1 April 1995 hingga 31 Mac 1997. Pilihan untuk membaharui itu dilaksanakan oleh responden dan oleh itu, penyewaan akan luput pada 31 Mac 1997. Beberapa bulan sebelum peluputannya, perayu telah memaklumkan kepada responden-responden bahawa ia bersedia untuk membenarkan penyewaan baru bagi tempoh tiga tahun pada kadar RM4,500 sebulan. Pertikaian berbangkit apabila pihak-pihak tidak bersetuju dengan kadar penyewaan baru dan sebagai akibatnya, pihak-pihak tidak memasuki sebarang perjanjian sewa baru selepas 31 Mac 1997. Walau bagaimanapun, responden terus menghuni premis tersebut. Perayu kemudian memfailkan tuntutan untuk bayaran sewaan berganda. Pada masa itu, beberapa permohonan telah dibuat oleh perayu dan perintah-perintah berikut telah dibenarkan, iaitu, (i) bayaran interim sebanyak RM2,250 sebulan dari April 1997 sehingga penyelesaian tindakan ini (melalui perintah bertarikh 1 Disember 1998); (ii) responden-responden memberi milikan kosong premis tersebut kepada perayu (melalui perintah bertarikh 1 Mac 2004); (iii) bayaran dibuat kepada perayu bagi jumlah RM193,500 yang merupakan sewa yang dipersetujui dari bulan April 1997 sehingga Jun 2004, iaitu masa apabila milikan kosong diberikan (melalui perintah bertarikh 12 Julai 2006). Berkenaan tuntutan perayu bagi sewaan berganda, yang arif hakim bersandar atas isu doktrin *res judicata* dan memutuskan bahawa isu yang dibangkitkan telah pun dibicarakan dan diputuskan sebelum ini. Rujukan dibuat kepada perintah-perintah bertarikh 1 Disember 1998 dan 12 Julai 2006. Juga diputuskan

bahawa memandangkan perayu telah menerima amaun seperti yang dinyatakan dalam perintah-perintah tersebut, perayu sepatutnya dianggap telah mengetepikan jumlah yang dituntut untuk sewaan berganda. Oleh itu, rayuan ini. Adalah dihujahkan, antara lain, bahawa (i) doktrin *res judicata* tidak terpakai di sini; (ii) isu sama ada perayu layak untuk dibayar sewaan berganda tidak pernah dipertimbangkan oleh mahkamah; dan (iii) tuntutan untuk sewaan berganda adalah suatu isu yang masih 'hidup'. Sebaliknya, responden-responden menghujahkan bahawa (i) perintah pemilikan yang dibuat pada 1 Mac 2004 adalah satu 'penghakiman' dan oleh itu, bukanlah bersifat *interim* memandangkan ia memberi milikan premis tersebut kepada perayu; (ii) perintah milikan adalah penghakiman muktamad; dan (iii) semasa permohonan untuk milikan kosong dibuat, perayu sepatutnya memohon untuk sewaan berganda dari 1 April 1997 sehingga milikan dikembalikan. Dengan tidak berbuat demikian, responden berhujah bahawa perayu dihalang daripada membicarakan semula satu perkara yang sepatutnya dibangkitkan lebih awal lagi.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Perintah yang dibuat pada 1 Disember 1998 adalah berkaitan dengan sewa bulanan interim sehingga penyelesaian tindakan. Ia tidak berkaitan dengan isu sama ada perayu layak untuk dibayar sewaan berganda. Jelas, bahawa perintah itu bukanlah muktamad atau dibuat berdasarkan merit bagi bayaran untuk sewaan berganda. Perintah seterusnya bertarikh 12 Julai 2006 adalah berkaitan dengan bayaran sewa interim bagi RM2,250 yang tidak mempunyai sebarang kaitan dengan isu sama ada perayu layak untuk dibayar sewaan berganda.

(2) Apabila perayu memfailkan tindakan ini, salah satu relif yang dipohon adalah untuk bayaran sewaan berganda. Oleh itu, perayu telah mematuhi peraturan dalam *Henderson v. Henderson* bahawa seorang litigan perlu mengemukakan keseluruhan kesnya. Dengan berbuat demikian, perayu tidak salah apabila membuat permohonan interlokutori bagi milikan kosong dan bagi isu sewaan berganda untuk dibicarakan.

(3) Tuntutan bagi sewaan berganda adalah tuntutan yang diiktiraf di bawah s. 28(4)(a) Akta Undang-Undang Sivil 1956 ('Akta'). Tuntutan perayu untuk sewaan berganda adalah berdasarkan

isu sama ada terdapatnya pemegangan lepas masa oleh responden-responden selepas penamatan penyewaan mereka, yang benar-benar berbeza dengan isu sama ada perayu layak untuk menerima bayaran sewa interim sambil menunggu keputusan kes. Oleh itu, ia tidak boleh dikatakan bahawa perayu telah mengetepikan tuntutan sebegitu apabila ia mendapat perintah untuk bayaran bagi sewa-sewa *interim*. Tambahan pula, perintah untuk milikan kosong tidak memutuskan atas persoalan sama ada perayu layak untuk dibayar sewaan berganda.

(4) Tuntutan perayu untuk sewaan berganda dan permohonan bayaran bulanan sewa interim bukanlah tuntutan yang alternatif dan eksklusif kepada yang satu lagi. Ia merupakan tuntutan berlainan, di mana satu adalah untuk bayaran bagi pemegangan lepas masa dan satu lagi untuk bayaran sewa, kedua-duanya di mana tuan tanah layak untuk menuntut jika keadaan faktual boleh dibuktikan yang membolehkannya berbuat demikian.

(5) Pada 31 Mac 1997, penyewaan responden-responden telah pun ditentukan melalui peluputan masa di mana tiada perjanjian sewa baru dimasuki di antara pihak-pihak. Tanpa memberi milikan kosong premis, responden-responden terus menghuninya walaupun selepas peluputan penyewaan mereka. Oleh itu, s. 28(4)(a) Akta dibangkitkan dan perayu-perayu layak untuk mengenakan amaun sewaan berganda atau dengan nilai berganda premis tersebut. Dalam kes ini, perayu memilih untuk menuntut amaun sewaan berganda. Apabila penyewaan luput, responden-responden membayar sewa untuk RM2,250 sebulan dan nilai bergandanya adalah sebanyak RM4,500.

[Responden-responden diarahkan untuk membayar sewaan berganda pada kadar RM4,500 sebulan dari 1 April 1997 sehingga 30 Jun 2004 yang membuatkan jumlah untuk dibayar sebanyak RM391,500. Daripada amaun tersebut, jumlah sebanyak RM195,750 ditolak sebagai amaun yang telah pun dibayar kepada perayu].

Case(s) referred to:
Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28(4)(a)
Rules of the High Court 1980, O. 14A

For the appellant - SS Muker (CS Tan with him); M/s CS Tan Ang & Co
For the respondents - Max Yong Boon Swee; M/s Kiru & Yong

[Appeal from High Court, Shah Alam; No: B-02-1707-2011]

Reported by Kumitha Abd Majid

JUDGMENT

Clement Skinner JCA:

Introduction

[1] We had earlier heard the appeal of YT Marketing Sdn Bhd ("the appellant") against the decision of the High Court Shah Alam dated the 8 August 2011. By its decision the High Court dismissed the appellant's claim for payment of double rental of premises owned by the appellant and occupied by Tan Whye Kion and Ong Bee Bee trading as Heads Unisex Saloon ("the respondents") as tenants.

[2] We allowed the appeal. These are our reasons for doing so.

The Facts

[3] The appellant is the registered owner of a four-storey building at No. 36, Lorong Gopeng, Klang. It let out the ground floor of the building (the demised premises) to the respondents under a tenancy agreement ("tenancy agreement") dated 11 May 1992.

[4] The term of the tenancy of the demised premises was for three years commencing from 1 June 1992 and expiring on 31 March 1995.

[5] The tenancy agreement contained an option clause to renew the tenancy for a further two years from 1 April 1995 to 31 March 1997 at an agreed rental of RM2,250 per month. The option to renew was exercised by the respondents, so the tenancy would expire on 31 March 1997.

[6] Some months before the expiry of the tenancy, correspondence was exchanged between the appellant and respondents about the demised premises, with the appellant indicating to the respondents that even though it wished to have the demised premises for its own use, it was prepared to grant the

respondents a new tenancy for three years at RM4,500 per month with an option to renew for another two years at a rental of RM6,000 per month, and sent the respondents a draft tenancy agreement. However the parties could not agree on the new rentals.

[7] As a result no new tenancy agreement was entered into between the appellant and the respondents after 31 March 1997, but the respondent continued to remain in occupation of the demised premises.

[8] On 6 May 1997 the appellant commenced this suit at the Klang Magistrates' Court as Civil Summons No. 72-509-1997. We will return to the prayers sought in this suit shortly.

[9] The appellant subsequently applied to transfer this suit to the Shah Alam High Court and by order dated 15 November 1997 the application was granted and this suit was registered as Shah Alam High Court Civil Suit No. 22-468-1998 (as the entitlement of this appeal indicates).

[10] In the meantime, the appellant filed a "notis permohonan bagi pembayaran interim" dated 18 September 1998 at the High Court Shah Alam in which the appellant applied that the respondents pay RM4,500 per month from April 1997 "sehingga penyelesaian tindakan ini". On 1 December 1998 by consent the High Court made an order which in its material part reads:

> DAN kedua-dua pihak bersetuju MAKA ADALAH DIPERINTAHKAN bahawa pihak Defendan/Responden membuat pembayaran-pembayaran interim sebanyak RM2,250.00 sebulan daripada bulan April 1997 sehingga penyelesaian tindakan ini.

[11] The monthly interim payments of RM2,250 were apparently paid into the respondent's solicitors account from 1 December 1998.

[12] The appellant subsequently on 10 January 2002 filed in a summons in chambers application seeking vacant possession of the demised premises on the ground that the tenancy had expired on 31 March 1997 by effluxion of time.

[13] On 1 March 2004 the High Court granted the appellant's application and ordered that the respondents do quit and deliver vacant possession of the demised premises to the appellant.

[14] On 30 June 2004, the respondents took steps to hand over vacant possession to the appellant, but documents seem to suggest that vacant possession was actually only handed over on 8 July 2004.

[15] On 14 September 2005 the appellant filed a summon-in-chamber applying for payment out to it of the sum of RM193,500, representing the agreed rentals from April 1997 to June 2004 (when vacant possession was handed over) and which had been paid to the respondents' solicitors following the consent order of 5 November 1997.

[16] On 12 July 2006 the High Court granted the appellant's application for payment out.

[17] On 17 April 2007 the respondents' solicitors paid over to the appellant's solicitors a sum of RM195,750 in compliance with the High Court order of 12 July 2006.

[18] On 9 June 2008 the respondents filed a summon-in-chambers application under O. 14A of the Rules of the High Court 1980 asking the court to decide whether the court, having made (i) the order of 1 March 2004 for vacant possession, (ii) the consent order of 1 December 1998 for interim payment of rental at RM2,250 per month and (iii) the order for payment out of 12 July 2006, the court was *functus officio* in this case. After hearing submission of the parties the court (a different judge) dismissed the respondents' application.

The High Court Decision

[19] This suit came on for trial before the learned judge on 25 April 2011. The notes of proceedings show that the case proceeded to trial in respect of the appellant's claim and the respondents' counterclaim. The appellant and the respondents called one witness each.

In her judgment the learned judge identified the two issues for trial as these:

> A. The principal issue raised is whether the Defendants (Respondents) were Tenants Holding Over between the period of 1.4.1997 to 8.7.2004 and therefore liable to the Plaintiff (Appellant) for double rental of RM4,500.00 per month during that period.

B. The issue raised by the Defendants' counterclaim is whether the Tenancy Agreement is void and unenforceable on account of illegality, and whether the Plaintiff's illegal extension had encroached into the demised premises rented to the Defendant.

[20] In respect of the appellant's claim for double rental the learned judge held:

Res Judicata

The issues raised by parties in this action had been previously litigated and determined. Reference is made to the following orders:

(1) A consent order made (case No. MT1-22-468-1998) dated 1.12.1998 wherein both parties agreed that the Defendant pay interim payment of RM 2,250.00 per month from April 1997 "sehingga penyelesaian tindakan ini";

(2) The High Court by order dated 12.7.2006 had ordered the Defendant to pay the sum of RM 195,750.00 as agreed rent to the Plaintiff for the period 1.4.1997 to 30.6.2004.

The Plaintiff had accepted the amount and therefore must be deemed to have waived any sums for double rental for the above mentioned period.

Chan Siew Gim v. Williams Lee [1981] 2 MLJ 154.

Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor [1993] 2 MLJ 469

Carl-Zeiss-Ziftung v. Rayner & Keeler Ltd & Ors [1966] 2 All ER 536.

The learned judge also dismissed the respondents' counterclaim for reasons which we need not go into for the present purposes.

This Appeal

[21] On behalf of the appellant it was argued that the doctrine of *res judicata* had no application to the facts here and the appellant, by accepting the payment out of the rentals cannot be deemed to have waived its claim for double rentals. It is the appellant's case that since the respondents had continued to occupy the demised premises after the tenancy period that expired on 30 March 1997, it became necessary to apply for an order that the respondents make interim payments of the monthly rental, "sehingga penyelesaian tindakan ini." According to the appellant

the issue of whether it was entitled to be paid double rental was never considered by the court when it granted its consent order of 1 December 1998 nor was it an issue between the parties in the application for interim payment of rental. Likewise, the appellant said that when the court made its order for payment out on 12 July 2006, the issue of double rental was not the issue before the court. The order for payment out was in respect of the interim payment of rentals for the period 1 April 1997 to 30 June 2004 amounting to RM195,750 which was calculated at RM2,250 per month. Hence the order for payment out also did not concern the appellant's claim for double rental.

[22] Accordingly it was the appellant's contention that its claim for double rental was very much a "live" issue when the case came up for trial before the learned judge on 25 April 2011.

[23] The respondents contended that the order for possession made on 1 March 2004 was a "judgment" and therefore was not interim in nature since it gave possession of the premises to the appellant.

[24] The respondents next referred to the doctrine of *res judicata* and to that passage in the judgment in *Henderson v. Henderson* [1843] 3 Hare 100 at p. 115 where Wigram VC said:

> ... where a given matter becomes subject to litigation, and if adjudicated by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under certain circumstances) permit the same parties to open the subject of litigation in respect of the same matter which might have been brought forward as part of the subject of contest, but which was not brought forward ... ... This plea of *res judicata* applies, except in special cases, not only to the points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject at litigation, and which the parties exercising reasonable diligence, might have been brought forward at the time.

Relying on the above passage and what learned counsel for the respondents described as the application of *res judicata* in its "wider sense", the respondents contended that when the appellant applied for vacant possession by its summons in chambers the appellant could also have included a prayer for double rent from 1 April 1997 until possession was delivered up. The respondents contended that by not doing so, the following things resulted:

(a) The appellant was prevented from re-litigating a matter which could have been raised in its order for vacant possession but was not;

(b) The order for possession was a final judgment;

(c) After obtaining such final judgment for possession, when the appellant applied for payment out of the interim rental payments, the appellant had abandoned or waived its claim for double rental.

[25] We do not agree with the respondents' submissions.

[26] In the first place, the learned judge applied the doctrine of *res judicata* based on the order made on 1 December 1998 and the subsequent order of payment out dated 12 July 2006. Both orders must be read properly. The order made on 1 December 1998 is of particular importance. It relates only to the interim payment of monthly rentals of RM2,250 per month pending the final disposal of the action. The order clearly did not relate to or concern the issue of whether the appellant was entitled to be paid double rental. Clearly the order of 1 December 1995 was neither a final order in relation to the claim for double rental nor had the order of 1 December 1998 been made on the merits regarding the payment of double rentals.

[27] In the second place, the subsequent order for payment out dated 12 July 2006 relates directly to the payment out of interim rentals of RM2,250 which has nothing to do nor concerns the issue of whether the appellant is entitled to be paid double rental.

[28] In the third place, we do not agree with the respondents' contention that because the appellant did not put forward its claim for double rental when it applied for an order of vacant possession, the appellant is barred by *res judicata* from re-litigating the claim. It must not be overlooked that when the appellant filed this suit, one of the reliefs it sought was for payment of double rental. Therefore, the appellant had already complied with the rule spoken of by Wigram VC in *Henderson v. Henderson (supra)* that a litigant, should put forward his whole case. Having done so, we find nothing wrong in the appellant having made an interlocutory application for vacant possession while leaving the issue of double rental to go to trial.

[29] The appellant's claim to be paid double rental having been already put on the record and before the court waiting to be tried, we cannot see on what basis the learned judge found the appellant is deemed to have waived its claim for double rental. The claim for double rental is a claim recognised by s. 28(4)(a) of the Civil Law Act 1956. The section states:

> (4) (a) Every tenant holding over after determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

So the appellant's claim for double rental fell to be decided on the issue whether the respondents were holding over after the determination of their tenancy, which is a completely different issue from whether the appellant is entitled to obtain an interim payment of rental while awaiting the outcome of the case. We do not see how the appellant can be said to have waived such a claim when it obtained an order for payment out of the interim rentals.

[30] The respondents also argued that the order for vacant possession was a final judgment. We do not agree. Clearly the order for vacant possession did not address or decide the question of whether the appellant was entitled to be paid double rental.

[31] The respondents also contended that the appellant had "abandoned" its claim for double rental when it adopted one of the two alternatives and mutually exclusive courses open to it. According to the respondent by applying for payment out of the interim monthly rentals the appellant had adopted a course which is opposite to its right to double rentals. Therefore, according to the respondents the appellant had abandoned its claim for double rental. We do not agree. Contrary to what the respondent claims, the appellant's claim for double rental and the appellant's application for interim payment of monthly rentals are not claims which are alternative and mutually exclusive to the other. As we indicated earlier, they are completely different claims – one is a payment for holding over whereas the other is a payment of rental, both of which a landlord would be entitled to claim if he can prove the factual circumstances permitting him to do so.

[32] With regard to the appellant's claim for double rental, we were informed by counsel that the learned judge did not make any finding on the issue of when the tenancy was determined, even though she was asked to decide that question.

[33] We find there is sufficient evidence in the record of appeal to allow us to come to a finding that the respondents' tenancy determined on 31 March 1997 by effluxion of time. The evidence led through Yew Ah Kow ("PW1") on behalf of the appellant was that the respondents' initial tenancy agreement was for a period of period of three years commencing from 1 July 1989 until 30 June 1991 at a monthly rental of RM1,250 per month. In 1992 the appellant and respondents entered into a fresh tenancy agreement dated 11 May 1992 which the court marked exh. P3. The tenancy period were for three years commencing 1 April 1992 and expiring on 31 March 1995. The agreement contained an option to renew for a further term of two years at a rental not to exceed 25% of the last rental paid by cl. 5(d). PW1's evidence was that the respondent duly exercised the option and so the tenancy was extended for another two years from 31 March 1995 at an agreed rental of RM2,250.

[34] PW1 testified that at the end of the extended term of two years on 31 March 1997, no fresh tenancy agreement was entered into with the respondents although a draft tenancy agreement was prepared by the appellant's solicitors and forwarded to the respondents on 3 December 1996. In the draft the appellant wanted a monthly rental of RM4,800 per month and if the option to renew for a further two years was exercised the rental would be RM6,000 per month, but since the amount of rentals could not be agreed upon, no new tenancy agreement was signed.

[35] In his evidence Mr Tan Whye Kion (DW1) said the respondents did not agree to the increase in rental in the draft tenancy agreement as it represented a 100% increase for the first three years period and the appellant was informed of it by the respondent's letter dated 27 January 1997.

[36] On 20 March 1997 the appellant's solicitor wrote to the respondent asking them to deliver vacant possession of the demised premises on 31 March 1997 and in the event the respondent did not do so, the respondent will be treated as a tenant holding over who is liable to pay double rental. On 12 May 1997, after the expiry to the tenancy, the respondent wrote to the appellant tendering RM2,250 by way of rental but by letter

dated 15 May 1997 the appellant wrote back saying the tenancy had been terminated on 31 March 1997 and refused to accept the respondents' payment.

[37] In our judgment the above evidence clearly establishes that by 31 March 1997 the tenancy of the respondents had determined by effluxion of time, whereafter no new tenancy agreement was entered into between the parties. Instead of delivering up vacant possession of the demised premises the respondents continued to hold over after the determination of their tenancy.

[38] In our judgment, on the respondents continuing to hold over the demised premises after the determination of their tenancy by effluxion of time, s. 28(4)(a) of the Civil Law Act 1956 came into play and the appellants were entitled to charge the respondents double the amount of their rental or with double the value of the demised premises. In this case the appellant chose to claim double the amount of the respondents' rental. The evidence shows that when the tenancy expired, the respondent was paying RM2,250 per month rental. Double that would amount to RM4,500.

[39] It was for all the above reasons that we found the learned judge had erred in law and on the facts in arriving at her decision. We according allowed the appeal, set aside the order of the learned judge in relation to the appellant and made the following orders:

(i) That the amount of double rental payable by the respondent is RM4,500 per month which figure is double that of RM2,250;

(ii) That the respondent is to pay double rental at RM4,500 per month from 1 April 1997 until 30 June 2004 being 87 months thereby making the sum payable of RM391,500;

(iii) That from the amount of RM391,500 the sum of RM195,750 be deducted representing the amount already paid to the appellant;

(iv) That the balance payable will bear interest at the rate of 8% per annum from 6 May 1997; and

(v) That costs of RM15,000 here and below be paid by the respondents.